MEMORANDUM OF TESTIMONY
Substitute HB 4001
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Following is a written version of the testimony I provide today regarding Substitute HB 4001. We are prepared to assist and offer our assistance with revisions of HB 4001 not only to address our concerns but, more importantly, to work to develop language that better serves most if not all interest by simplifying and clarifying for all stakeholders what is required under the FOIA.

HB 4001

We appreciate the efforts to compromise and accommodate the seemingly conflicting interests that have weighed in on this bill and its predecessor last session, HB 5879.

However, the revisions that have resulted in the substitute HB 4001 that is before you create a bill that is tortuous to follow by a person wanting to make a request or by a state or local government employee who has to respond to a request. In large part, these changes simply restate in many, many more words the existing statute, but adding a number of possible trip points for a government employee who is responding to FOIA requests and ignoring the very real burdens on governments that have to respond to FOIA requests. More important, I don't think these additional words will serve to resolve the concerns that have been raised regarding either the timeliness of responses or costs that have been charged. In fact, they may exacerbate those concerns.

Comments on Section 4
Subsection (1)
If this bill were to be written in Plain English, it would say that only the actual costs of the lowest paid person capable of performing a task would be charged. It could identify the tasks for which time could be charged, including searches, retrievals, separation and deletions or redactions, copying of any type, and delivery by mail or other method.

It would allow an entity to charge an hourly rate calculated by increments of no more than a quarter hour, thereby allowing an entity to charge by tenths of an hour or by minutes spent. It could require rounding, but should follow the normal principles of rounding that we all learned in elementary school instead of requiring entities to round down. An entity should not have to absorb up to 14 minutes of time for each of several tasks for which HB 4001 now requires the time to be accounted for separately, even after the entity has established that the costs incurred are unreasonably high and it is entitled to reimbursement.

If rounding down is required, the increment used should be consistent with the increment used to impose the charges, at the government entity's discretion.

In addition, because a staff person may be multi tasking when searching for, reviewing, separating and copying records, the obligation to account separately for the time for each of those tasks will impose an unrealistic and potentially nightmarish time tracking burden. If an employee spends a total of 42 minutes during which he undertakes searches, identification and separation of exempt material, and copying, including redactions to prevent disclosure of exempt material, and estimates that he spent 14 minutes on each of the 3 tasks, the government entity can recover nothing under the proposed bill. If the government entity could charge the combined time, it could recover costs for 30 of those minutes if it had to round down by the quarter hour. If the entity charged its time by the minute, it would recover 42/60th of that time instead of nothing. If the entity charged by tenths of an hour, it could recover 7/10ths of that time instead of nothing. Precluding recovery of any costs because the tasks are divided as proposed contradicts the premise in the FOIA that recovery is allowed when the costs of response for an entity are unreasonably high.

A Plain English version with clear, simplified steps and calculations would make it much easier for requesters as well. Keeping in mind that the purpose of FOIA is for people to see how government works, a requester will want to know (1) how much time did it take to respond, (2) what was the cost of the copies (if there is a charge for the copies, as opposed to the time spent making the copies), and (3) what was the cost to mail or otherwise deliver those copies. If some safe harbor provisions for the calculation of costs are desired, that could be done.

For those of you who have scanned any documents will know, the requirement for double-sided scans is an infeasible requirement as a scan, by definition, is seen one page at a time. It is unclear what the purpose of this provision is. The requirement that copies or printed records be double-sided may be an effort to go green and also to save on postage; however, it will not save on copying or printing costs. A double-sided paper copy at any copying establishment is still the same cost as two single-sided pages.

Other revisions are in order as well. For example, there is no definition of what is meant by "bulk cost." Does it mean the government agency's cost? How many must be purchased to qualify as a bulk cost? What if the agency does not purchase that many disks or flash drives? "Actual cost" would be a better term.

Subsection (2)

I can foresee possible challenges to the amendments to Paragraph (A) of Subsection (2) on the grounds that non-indigent persons are not required to state the reason for their requests and are not limited to tow (2) requests per year. If those challenges were held to have merit, these amendments would be for naught. However, assuming these changes are not challenged or are upheld as valid restrictions on the public's right to know, there are some drafting issues.

The measurement of the year for purposes of the limit of two requests per year is not defined. Is it a calendar year? Or is the twelve month period reset every time a request is received? Neither method is better or worse, but they are different. However, the

measure of the year period should be defined so that there is no confusion for either requesters or government entities.

This subsection requires an indigent requester to state the purpose for the request if it is not a request for information about the requester. However, it does not provide a reason why that purpose must be stated. Are there purposes that are legitimate? Are there purposes that are invalid? A request by a non-indigent requester cannot be denied based on what the government entity thinks the purpose of the request might be. Therefore, there is no precedent for what might or might not be a legitimate purpose for a request by a person who is indigent.

If the drafters of HB 4001 believe that there are purposes that are not legitimate, such as requests solely for commercial purposes and not in furtherance of transparency in government, then those should be imposed on all requests. The US Supreme Court recently upheld the Virginia prohibition on public records requests from out-of-state requesters, focusing its discussion in part on the purpose of open records statutes being for openness in government for constituents of the government rather than for commercial purposes.

We agree with and applaud the amendment to exclude from the indigency exemption requests made on behalf of another party if the requester is being paid or receives other remuneration for that request. Perhaps it would be better to say "anything of value" as opposed to "remuneration." More important, this prohibition should be simplified and should prohibit a request by a person claiming indigency if that request is being made on behalf of another entity or person who cannot claim indigency.

The amendments to Paragraph (B) of Subsection (2) raise a couple of issues. First, FOIA prohibits requests by prisoners. I understand Paragraph (B) will allow certain non-profits to make requests on behalf of prisoners. The provision that prohibits requests from prisoners should be amended to except from the prohibition any requests made under Paragraph (B) of Subsection (2).

Second, the amendment to allow these non-profit organizations to make these requests assumes that all their clients are indigent, which may not be the case. A better way to address requests by an agency or advocate on behalf of an indigent person should not be limited to one particular type of organization. Rather, Paragraph (2) should explicitly allow an advocate or agency that is making a request for an indigent person to identify the individual and provide the documentation of that person's indigency. We do that routinely for requests from Legal Services on behalf of their indigent clients. As a matter of statutory interpretation, the proposed amendment to allow such requests by only one identified type of non-profit may then be read to preclude treating as indigent requests any requests by other agencies - even if those agency serve indigent clients who would qualify for the exemption if they were able to and made the requests themselves.

The requirement that a non-profit agency provide documentation of its eligibility every time it makes its requests will be unduly cumbersome. If the state has a list of authorized agencies, it might be better to require the state to post that list and allow government agencies to rely on the list for which agencies are eligible for the exemption under Paragraph (B).

Subsection (3)
We are disappointed that HB 4001 has eliminated a welcome clarification in the prior draft to the effect that the time clock for response stops during the time an agency waits for a deposit from a requester.

Subsection (4)
The requirement of an invoice in addition to a response letter will add 400 or more pages to the City of Ann Arbor's FOIA files every year for non-police requests alone. That is 8 reams of paper worth of filing space we will have to create for this additional paper. That would be at least doubled when this requirement is applied to police records requests as well. If the double sided page requirement is intended to make FOIA responses go green, this invoice requirement will more than eliminate any green impact of that amendment.

My comments about making the calculation of fees in Subsection (1) more complicated also apply to the requirement that 6 fee categories be itemized in the invoice - or even in a response letter if we persuade you to eliminate the separate invoice requirement.

Subsections (5) and (6)
We agree with the provision in the new Subsection (5). As long as the penalties in Section 10 do not apply to the conduct required by Subsection (6), we do not object.

Subsection (7)
The purpose and operation of Subsection (7) is unclear. Estimates for FOIA responses are not provided unless the government agency requires a good faith deposit of half the cost for the response. If an estimate is being required as the first response, before a response is made, it will slow down the response process, place a burden on the requester to respond to the estimate to confirm that he or she wants to proceed, even if the estimate of costs is "no cost" or a cost under $10, and otherwise add hurdles, time and cost to the process. Requesters who are concerned about possible costs routinely ask that requests not be responded to if the cost will exceed an amount that requester identifies. In those cases, the agency can provide an estimate and let the requester decide whether to continue with the request, revise it to reduce the response cost, or withdraw it.

Comments on Section 5
Subsection (8)
Section 10 does not authorize a circuit court to reduce fees that are properly calculated and charged. The proposed language referencing the alleged authority of a circuit court to reduce properly calculated fees should be removed.

General and Additional Comments

We previously suggested that a requester first exhaust administrative remedies by an appeal to the head of the body before the requester files an action with the circuit court. Our experience has been that virtually all of our appeals have been successfully resolved via internal appeals without a requester needing to file an action in circuit court. A circuit court does not have the time limits for deciding a FOIA case that the government entity has for deciding a FOIA appeal. We are disappointed that this suggestion, which would serve both requesters and government agencies, was not included.

When a group of representatives of different interests met at Representative Shirkey's invitation to discuss issues and concerns, it was clear that there were complaints about government agencies that did not respond in a timely manner, or that requesters thought charged too much. However, it also was clear that they were not appealing those denials within the government agency to which the request had been made; nor were they filing actions in court to seek compliance. It is unlikely that increasing punitive damages for arbitrary and capricious denials and providing that an appeal or court action can address improperly calculated fees as well as denials will spur more court actions. Requiring internal appeals as a prerequisite to court action should both result in and encourage requesters to seek faster resolutions of problems that may arise.

A couple of our suggestions are an attempt to address concerns raised by others at the meeting we had at Representative Shirkey's invitation and are not necessarily suggestions just for the benefit of local governments. Again, we suggest that the representatives of different interests might have an opportunity to reconvene and continue their discussion, using this draft of HB 4001 as a basis for the discussion, in order to help this committee or staff synthesize the comments you are receiving so that you will get back a revised draft that address the various concerns and interests that have been raised.

Finally, we had suggested a couple of other amendments that did not appear to be controversial to representatives of other interest groups, but which were not included in Substitute HB 4001.

One was to amend Section 13(1)(v), the prohibition against requests by a party to a civil action with the government entity, to (1) clarify that civil actions include civil infraction proceedings and (2) explicitly prohibit requests by another person on behalf of a party to a civil action with the government entity.

Another was an amendment to Subsection (4) of Section 10 to require that requester file his or her circuit court action in the county where the government agency's principal place of business is located or where the requested records are located, and would eliminate the ability of the requester to file the action in the county where he or she resides if it is different.